83-791

NO. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1983

THE STATE OF TEXAS,

Petitioner

V.

JIMMY LLOYD MEAD,

Respondent

Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS CORRECTLY APPLIED *WITHERSPOON V. ILLINOIS*, 391 U.S. 510 (1968) AND *ADAMS V. TEXAS*, 488 U.S. 38 (1980), WHEN IT REVERSED A TRIAL COURT'S EXCLUSION FOR CAUSE OF ONE VENIREMAN WHO UNAMBIGUOUSLY STATED THAT HE WOULD AUTOMATICALLY VOTE TO PRECLUDE IMPOSITION OF THE DEATH PENALTY.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals entered in this case on January 12, 1983, rehearing denied on September 14, 1983.

OPINIONS BELOW

The *en banc* opinion of the Texas Court of Criminal Appeals is reported at 645 S.W.2d 279 (Tex.Crim.App. 1983), and is attached as Appendix B. Rehearing *en banc* was denied on September 14, 1983, without written opinion, with four judges dissenting. The unpublished dissenting

opinion to the denial of the State's second motion for rehearing without written opinion in attached as Appendix A.

JURISDICTION

The *en banc* opinion of the Texas Court of Criminal Appeals was delivered on January 12, 1983. A timely filed motion for rehearing was denied on September 14, 1983. This petition for writ of certiorari is filed within sixty days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below.

Respondent was convicted pursuant to a judgment of the Criminal District Court Number Two of Tarrant County, Texas. On February 27, 1979, Respondent was indicted or the murder of James Michael Carpenter, who, known to Respondent, was a peace officer acting in the lawful discharge of an official duty. Trial began on June 4, 1979, and on July 11, 1979, the jury found Respondent guilty of the capital offense. On July 12, 1979, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, V.A.C.C.P. Accordingly, punishment was assessed at death.

Respondent appealed his judgment and sentence to the Court of Criminal Appeals, which on January 13, 1983, reversed and remanded, with four judges dissenting. *Mead v. State*, 645 S.W.2d 279 (Tex.Crim.App. 1983)(*en*

banc). The state's first motion for leave to file a rehearing was denied without written opinion on February 16, 1983. The state then filed a second motion for leave to file a rehearing on February 18, 1983, which was granted on March 23, 1983. Rehearing *en banc* was denied on September 14, 1983, without written opinion, with four judges dissenting.

B. Statement of Facts

Venireman Arturo Cabriales Espindola [1] unambiguously and unequivocably stated on direct examination during jury voir dire that he would automatically vote against the imposition of capital punishment regardless of any evidence that might be developed at trial (SF 2226-27). [2] When asked whether his firm opposition to the death penalty would prevent him from objectively looking at and deciding the facts, venireman Espindola requested further clarification (SF 2228). The state then explained the Texas procedure of submitting special issues and explained the possible effects of answering those questions (SF 2228-31). Venireman Espindola subsequently responded that because of his commitment against capital punishment, he would automatically vote "No" to these questions, regardless of the facts, in order prevent imposition of the death sentence (SF 2232).

On cross-examination by defense counsel, venireman Espindola stated that he would not forswear himself; that he would not intentionally and deliberately answer the special issues untruthfully if he believed beyond a reasonable doubt that the answer should be "Yes". (SF 2234-35). When further asked whether he could set his feelings against capital punishment aside and answer the

1. The voir dire examination of venireman Espindola is attached hereto as Appendix C.

2. "SF" refers to the statement of facts of Petitioner's 1979 trial.

questions truthfully based on the evidence, he responded that he could answer the questions truthfully but could not set his feelings aside (SF 2236). Only after phrasing all of the preceding questions in such a manner as to impute improper conduct to the venireman, did defense counsel ask venireman Espindola if he could answer the questions based solely on the evidence adduced at trial (SF 2236).

REASONS FOR GRANTING THE WRIT

I.

THERE ARE SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT

There are special and important reasons to consider the issue presented herein. In holding venireman Espindola's exclusion improper, the Texas appellate court failed to adhere to settled principles established by this Court in *Witherspoon v. Illinois*, 491 U.S. 510 (1968) and *Adams v. Texas*, 488 U.S. 38 (1980). Further, the question of the extent to which defense voir dire questions concerning a promise to be truthful will sufficiently rehabilitate a juror who is unambiguously and irrevocably committed to vote against imposition of the death sentence and who unequivocably states that he will answer the special issues "No" to prevent imposition of the death penalty has not been, but should be, settled by this Court.

II.

THE COURT BELOW COMMITTED CLEAR ERROR IN THE APPLICATION OF THE *WITHERSPOON* STANDARD WHEN IT REVERSED THE TRIAL COURT'S EXCLUSION FOR CAUSE OF VENIREMAN ESPINDOLA.

In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), this Court held, *inter alia*, that in a capital trial, no venireman could be excluded for cause for his views regarding the imposition of the death penalty unless he made unmistakably clear that he would "*automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed" at trial, or that his "attitude toward the death penalty would prevent [him] from making an impartial decision as the defendant's *guilt*". 391 U.S. 522-23 n.21 (emphasis in original). *See also Adams v. Texas*, 448 U.S. 28 (1980); *Davis v. Georgia*, 429 U.S. 122 (1976); *Boulden v. Holman*, 394 U.S. 478 (1969). At Respondent's trial, the judge excluded venireman Espindola on the grounds that he was irrevocably committed to vote against the imposition of the death penalty.

The voir dire testimony of venireman Espindola reveals a juror irrevocably, unambiguously and unequivocably committed to vote against imposition of capital punishment:

Q. Is this belief — you don't believe in the death sentence — as your being part of the jury that would have to inflict the death penalty?

A. Sir, I don't believe in the death penalty.

Q. At all?

A. At all.

Q. And, you could not vote for the death penalty in a case no matter how horrible the facts were?

A. No, sir, I could not vote for the death penalty.

Q. . . . you are irrevocably committed before the trial begins to vote against the death penalty regardless of the facts and circumstances because of your beliefs?

A. That's right.

(SF 2226-27). After the state explained to venireman Espindola the Texas procedure of submitting special issues and explained the possible effects of answering the questions affirmatively, venireman Espindola stated that he would automatically vote "No" to the questions submitted to prevent the imposition of the death sentence.

Q. Because you don't believe in the death penalty, then would you automatically vote no to these questions no matter what the facts were to keep the man from getting a death sentence?

A. I imagine I would.

Q. All right. Because of your beliefs?

A. Yes, because of my beliefs.

Q. And, your beliefs would have a — would enter into these deliberations because you just don't believe in it, and you could not vote yes and you would vote no, is that right?

A. Yes, that's right.

(SF 2232). Thus, initial statements by venireman Espindola clearly establish a juror unalterably opposed to the death penalty, and one unwilling and unable to answer the questions based solely on the evidence presented. At this point in the voir dire testimony, exclusion of

venireman Espindola was clearly proper under the *Witherspoon* standard.

It is incumbent upon a defendant seeking to rehabilitate a juror whose unambiguous and unequivocable opposition to capital punishment has been established to ask questions sufficient to elicit a response that such juror would be willing to set aside his personal antipathy toward capital punishment and to find the facts based solely on the evidence presented at trial. *Accord, O'Bryan v. Estelle,* 714 F.2d 365 (5th Cir. 1983). This, defense counsel failed to do. On cross-examination the following testimony was elicited:

> Q. And, if the State —, the next thing I'll ask you before we get the effect is I will ask you — assume, if you will with me, that the prosecutors prove to you beyond any reasonable doubt that the evidence is there and the questions in your mind, you're convinced beyond any reasonable doubt that the questions should be answered yes, okay?
>
> A. Yes, I understand.
>
> Q. And, you're convinced of that in your mind beyond any reasonable doubt that the answers should be yes, okay?
>
> A. Yes, I understand.
>
> Q. And, would you be untruthful in your answer intentionally and would you just deliberately answer the question untruthful — untruthfully or would you answer the question according to what the evidence showed, according to your oath as a juror? Would you just intentionally and deliberately answer the question untruthfully?

A. No, I would not.

* * *

Q. So, you wouldn't answer it untruthfully?

A. I would not answer untruthfully, no way.

Q. So, if you were faced with — the questions that the prosecutor read to you over here, and you either had to answer the questions yes or no, and if you felt in your mind that the answers should be yes, and they have proved that to you beyond any reasonable doubt, and you're required to give a true answer to the questions asked of you, okay?

A. Okay.

Q. Would you, simply because you knew what the effect of your answer would be, simply for that reason, would you deliberately answer those questions untruthful just because you knew what the effect of the answers would be?

A. I said before that I wouldn't answer untruthfully.

* * *

(SF 2234-35). The tentative and qualified wording of defense counsel's questioning renders juror Espindola's response fairly useless for purposes of negating his initial unequivocable testimony that he would answer the questions "No" in order to avoid imposition of the death sentence. His response that he could answer the questions

truthfully was made only after defense counsel asked him if he would "intentionally and deliberately answer untruthfully," a question phrased to impute improper conduct to the venireman. The clear import of venireman Espindola's response is that he would not automatically forswear himself. That venireman Espindola was not willing or able to set aside his convictions against the death sentence and answer the questions based solely on the evidence, it made more evident by his later response:

> Q. And, could you set aside those feelings aside and look at the evidence if the Court instructed you to and look at the evidence and answer the questions truthfully based on the evidence? Could you do that?
>
> A. I could answer the questions truthfully, yes. But, I could not put my feelings aside the way that I feel.

(SF 2236). The voir dire examination, as a whole, demonstrates a juror who would automatically vote against the imposition of the death penalty without regard to any evidence which might be presented at trial and whose exclusion is proper under *Witherspoon v. Illinois*, *supra*, and its progeny. The questions asked by defense counsel were clearly insufficient to demonstrate a juror capable of or willing to decide the questions based solely on the evidence adduced at trial; and thus, clearly insufficient to rehabilitate venireman Espindola. The Texas Court of Criminal Appeals' holding to the contrary should be reversed.

CONCLUSION

For these reasons, Petitioner prays that the petition for certiorari to the Texas Court of Criminal Appeals issue.

Respectfully submitted,

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APPENDIX A

JIMMY LLOYD MEAD, Appellant
v.
THE STATE OF TEXAS, Appellee

Appeal from TARRANT County
No. 68,025

DISSENTING OPINION TO THE DENIAL OF STATE'S SECOND MOTION FOR REHEARING WITHOUT WRITTEN OPINION

To the majority's denial of the State's second motion for rehearing without written opinion, I respectfully dissent.

On original submission, this Court determined that a venireperson, Arturo Cabriales Espindola, was improperly excused by the trial court according to Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d (1968), and its progeny, and thereby reversed the appellant's conviction. See Mead v. State, 645 S.W.2d 279 (Tex.Cr.App. 1983). On January 27, 1983, the State filed a motion for leave to file the State's motion for rehearing, which this Court denied without written opinion. The State then filed a second motion for leave to file a motion for rehearing on February 18, 1983, which a majority of this Court voted to grant on March 23, 1983, which a majority of this Court voted to grant on March 23, 1983. Although I am mindful of the mandates required by Tex.Cr.App. Rule 309 and 310, I further note the express statutory authority given to this Court by Tex.Cr.App. Rule 4, which states:

> "In the interest of expediting a decision or for other good cause shown, a court of appeals or the Court of Criminal Appeals may, except as otherwise provided in these rules, suspend the requirements or provisions of any of these rules in a particular case on application of a party or *on its own motion*[1] and may order proceedings in accordance with its discretion. Provided, however, that nothing in this rule shall be construed to allow any court to suspend the requirements or provisions of the Code of Criminal Procedure."

Whether we consider this matter on our own motion or on the second motion for rehearing filed by the State is of no moment, because I believe a majority of this Court, by denying the State's second motion for rehearing without written opinion, has done substantial damage to the teachings of several of the opinions of this Court, and by sanctioning the opinion or original submission, places an interpretation upon *Witherspoon* that was never contemplated by the majority of the Supreme Court of the United States when that decision was handed down.

The appellant contends that the trial court erred by excluding venirepersons June Donnelly and Arturo Espindola from jury service upon the state's challenge for cause when neither venireperson was disqualified under the rule set forth in Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

Prosecutor Mike Worley investigated at length Mrs. Donnelly's views on the death penalty and how her views would influence her service as a juror. Following are pertinent parts of her voir dire:

---

1. All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.

Q. [PROSECUTOR]: Have you had an opportunity to think about your feelings on the death penalty or capital punishment since you were called as a juror in the trial of this case?

A. Yes.

Q. What are your thoughts about?

A. Well, I was in Florida last month when Spinkelink was executed, and at that time, we discussed at length the pros and cons.

Q. You say 'we'?

A. My husband and I. Then on the way back, we stopped at his brothers in Mississippi and we discussed it again, and it seems ironic because when I got home, I had this jury summons and I thought, well, I'll be down there a day or two --yes, I have thought a great deal about it.

Q. Did you reach any conclusion?

A. Yes.

Q. What was the conclusion?

A. I couldn't vote for a death penalty.

Q. All right. You understand that I'm not here to change your ideas or argue with you about any particular thing. it's important now that we know how you feel about these things. I take it that you put quite a bit of thought into this before you arrived at the decision that you couldn't vote for a death penalty?

A. Oh, a grest deal. As a matter of fact, I had two nightmares.

Q. This wasn't a snap decision?

A. No.

Q. Is this feeling on your part that you couldn't participate in a death sentence, resulting in our state by lethal injection, so strong and so firm that you would automatically vote against the imposition of the death penalty regardless of what the facts in the case might show?

A. I could vote guilty, but I would not want to be put in a position where I would have to say this man must die."

* * * *

Q. ...And, I need to know from you whether you could answer those questions fairly according to the facts with the knowledge that if you answered them in a certain way the death penalty would be imposed as a result of your verdict. Do you feel like you could not do that?

A. I would be truthful, but I can't say truthfully that I want a death penalty. I know you have to go by the law but is seems there are so may inconsistencies in murder cases."

* * * *

Q. Am I correct in stating that your convictions against the death penalty is so strong and so deep that you would not let anybody talk you out of it?

A. Yes, it is that strong.

Q. And, since it's that strong and that deep, can I take it that you cannot imagine any set of facts so horrible that you could vote for the imposition of the death sentence?

A. *I can only remember one where I could have voted for the death penalty.*

Q. If it came your — I understand that you feel that your are qualified and I'm sure you are to sit and determine whether the defendant in a capital murder case is guilty or innocent of the charge. Is that your feeling?

A. Yes.

Q. But, you understand that in the event that you find a defendant guilty of capital murder, then it becomes the jury's duty to pass upon the punishment to be imposed?

A. And, that's where I would bog down.

Q. And that's why I have to ask you — if you can — I'm going to try to ask you yes or no questions and if you can answer it yes or no, please do so. I'm not asking you to do something that you can't do. The question I have for you is this feeling on your part so firm that you would automatically vote against the imposition of the death penalty regardless of what the facts of the case might show.

A. Yes.

Prosecutor Worley then explained to venireperson Donnelly the punishment stage procedures in Texas capital murder trials and the special questions submitted to the jury. The voir dire of Mrs. Donnelly by the State ended on the following colloquoy:

Q. You said that the effect of your answers that either life in the penitentiary or the Court would impose the death sentence would affect you on how you would answer these questions of fact, and I take it that when you say that it would affect you that you mean that you would automatically not — no matter what the evidence showed, you would not answer all of the questions yes because you know if you answered all of the questions yes, the death penalty would be imposed.

A. I could not tell someone that they have to die.

* * * *

Q. ...I take it from what you told me a minute ago, you would automatically — you could not answer all of those questions yes knowing with the knowledge, and you have that knowledge, by answering those questions yes, the Court would impose the death sentence?

A. Yes.

Q. That's correct?

A. Yes.

At that time defense counsel Kearney requested that he be allowed to take Mrs. Donnelly on voir dire. Following are the pertinent parts of the defense voir dire:

Q. [DEFENSE COUNSEL]: Can you conceive in your mind a set of circumstances, facts that are so horrible if proven to you beyond a reasonable doubt that you could, if the evidence convinced you that you could consider the death penalty—I think you said there is *one circumstance that you could consider the death penalty?*

A. Yes.

Q. So, you can conceive a set of circumstances in your mind where if all of the evidence was there and you were convinced beyond a reasonable doubt, you could vote for the death penalty?

A. There were children involved in this case.

Q. We can't limit it to any particular thing. Whatever that you can conceive in your mind of a set of circumstances. It could by anything, okay? *There is a set of circumstances that you can visualize in your mind where you can vote for the death penalty, right?*

A. *I think only if there were children involved.*

THE COURT: Just a moment. Let's not get into what would be involved. The question must be answered. As I told you, we are speaking abstractly of the law. You can work this out in your mind anyway you want to, but the question you must answer is the question that he asked you that is can you in your mind think of a set of circumstances or facts on which you could sit as a juror and vote to impose the death penalty? You think that out as much as you want to. But, that's the question you must answer. Not what are the circumstances, *but are there cir-*

cumstances where you could sit as a juror and vote to impose the death penalty.

* * * *

A. *No.*

Q. The Judge's question to you said could you vote for—obviously, you don't know whether you could vote for it, but my question—

A. If I have to put yes or no, I would say no.

* * * *

Q. We are not asking you how you would vote in this case, you understand, because you have not heard the facts?

A. You mean in any case?

Q. Right. I'm talking about can you conceive in your mind a set of circumstances—now, a minute ago you told me that you could conceive in your mind, and you thought of one case where you could.

A. But, if you require either a yes or no answer, then I would have to say no.

Q. Did you earlier say that you could think of a set of circumstances—you said you thought of one, is that correct?

A. Yes, but if it got down to the nitty-gritty, I don't know if I could or not, even in that case.

* * * *

Q. You just answer yes or not to certain questions that are given to you. And, my question to you is, that if the State has proved a case beyond a reasonable doubt and they prove to you that those answers are yes and they have removed every doubt in your mind, reasonable doubt in your mind, that the answers are yes, and you're convinced in your mind from all of the evidence and all the circumstances and all the facts that the answer should be yes, could you answer the questions yes?

A. *I would not—I could not give a death penalty to anyone.*

Shortly after this response to the defense counsel's question, the trial court sustained the state's challenge for cause. There was no request for further questioning by the defense.

It is clear from the foregoing transcription that Mrs. Donnelly made it unmistakenly clear that she would automatically vote against the death penalty regardless of the facts of the case. Although she did state that she could be fair on the issue of guilt, she nevertheless indicated that she could not be impartial on the punishment issues.

The appellant argues that Donnelly became an equivocating juror during her examination by the defense. Although she did say that she might be able to consider imposing the death penalty in a capital murder case involving children, she ultimately answered that even in that case she did not know if she could vote for the death penalty or not. When Defense Counsel Kearney explained to her that as a juror she would not vote for life imprisonment or death, but rather that she would answer "yes" or "no" to the special questions, Mrs. donnelly insisted that, nonetheless, she could not give the death penalty to anyone.

This Court has held that in the area of equivocating jurors the rule set forth in *Witherspoon*, supra, does not require specific formalized answers. Hernandez v. State, 643 S.W.2d 397 Tex.Cr.App. 1982); Tezeno v. State, 404 S.W.2d 374 (Tex.Cr.app. 1972). The thrust of Mrs. Dunnelly's voir dire examination as a whole reveals her to be irrevocably committed against the imposition of the death penalty. The voir dire of Mrs. Donnelly actually was not so equivocal as to persuade me to label her a classic equivocating juror.[2] Having carefully reviewed the record, I conclude that the trial court's exclusion of Mrs. Connelly was not inconsistent with the rule set forth in Witherspoon: her answers reflected that she would have been irrevocably committed to vote against the imposition of the death penalty regardless of the facts and circumstances that might emerge during trial. *Witherspoon*, 88 S.Ct. at 1777, n. 1

After general questioning by prosecutor Borg, the following colloquy occurred regarding Mr. Espindola's views on the death penalty:

> Q. In a capital murder case in Texas, there are only two potential punishments, life in the penitentiary and death by lethal injection. In all other criminal cases in Texas, a jury that decides on punishment is given a range of punishment to pick from, because all cases are different. The legislature sets a range of years in the pentitentiary that the jury is to look and pick the appropriate punishment if they find the man guilty. And, in a capital case, like I say, it differs because there are only two potential

2. See, e.g., the voir dire examination of venireperson Smith in *Hernandez*, supra. Unlike Mrs. Donnelly, Mrs. Smith repeatedly answered that she "honestly didn't know" how she felt.

punishments, life in the pentitentiary or death by lethal injection. The Judge asked you, I believe, when you where all in here together, that—asked you to think about capital punishment. Have you had an opportunity to do that?

A. Yes, Sir.

Q. What are your feelings about it?

A. I have been going through this over in my mind and I really don't believe in life sentences. I don't believe in the other.

Q. Is this—you don't believe that you could be part of a jury that would inflict death on a person by lethal injection?

A. Yes, I don't believe in that, sir.

Q. And, as I say, we are here to find out what your beliefs are, not trying to get you to say what someone might want you to say or anything like that. You agree that people have a duty to serve on a jury?

A. I do.

Q. Do you also agree that if a person has personal beliefs in a particular case that would interfere with that jury service? They have the duty to tell the people about it and not serve if they couldn't serve and violate their own beliefs?

A. Well, I wouldn't like to violate my own beliefs. *But, I still say I do not believe in the death penalty.*

* * * *

Q. Is this belief—you don't believe in the death sentence—as your being part of the jury that would have to inflict the death penalty?

A. *Sir, I don't believe in the death penalty.*

Q. *At All?*

A. At All.

Q. Is this—this is a deep-seated and firm conviction on your part, I take it?

A. Yes, I was—ever since we got the briefing a week ago, I have been going through it in my mind and I just came to that conclusion, sir.

Q. *And, you could not vote for the death penalty in a case no matter how horrible the facts were?*

A. *No, sir, I could not vote for the death penalty.*

Q. I will go into the procedure a little more, but is this—because of this belief, you are irrevocably committed before the trial begins to vote against the death penalty regardless of the facts and circumstances because of your belief?

A. That's right.

* * * *

Q. Your beliefs are such that in a capital murder case, one where the punishment would be death by lethal injection, that you might have to tell the court that you could not take the oath to follow the law where the law might require you to give the death sentence by lethal injection, is that right?

A. I would like to clarify that.

Q. First of all, I'm not trying to argue with your beliefs. I'm just trying to get them down—you could not sit on jury and decide the facts knowing that the verdict would result in the death of an individual, if you had to decide a certain way, is that right?

A. *I would not know what the verdict would be sir, but I still do not believe in the death penalty.*

Q. And, would this belief prevent you from objectively looking at the facts? Would if affect your deliberations and have a profound effect on your deliberations and prevent you from deciding these facts.

A. I need more clarification on that, sir.

At this point Mr. Borg explained in detail the capital sentencing procedures in Texas. At the conclusion of this explanation he asked Mr. Espindola if the procedures were clear and the venireman answered that they were.

Prosecutor Borg continued with the following:

Q. Because you don't believe in the death penalty, *then would you automatically vote no to these questions no matter what the facts were to keep the man from getting a death sentence?*

A. *I imagine I would.*

Q. *All right. Because of your beliefs?*

A. *Yes, because of my beliefs.*

Q. And, your belief would have a—would enter into these deliberations because you just don't believe in it, and you could not vote yes and you would vote no, is that right?

A. That's right.

* * * *

At the conclusion of the State's voir dire of Mr. Espindola, defense counsel Kearney requested permission to take him on voir dire. The following voir dire took place:

Q. Sir, you understand that before you would even be faced with these questions, you first would have to be part of a jury that found a person guilty beyond any reasonable doubt of capital murder. You understand that?

A. I understand that.

Q. And, do you feel like you understand what the questions are that he read to you?

A. Yes,

Q. First of all, let me ask you if you feel like that you could answer those questions—first of all, before we get into what effect it would have on you, do you feel like you are the kind of person that could listen to the evidence and answer questions proposed to you?

A. Yes.

Q. You wouldn't have any problem with answering questions?

A. No, I wouldn't

[PROSECUTOR]: Objection—the question is not framed that these questions are the punishment questions that could lead to the—he's just talking about questions in general and this is beyond the scope of the voir dire.

THE COURT: I'll overrule the objection.

Q. [DEFENSE COUNSEL]: Second, you understand that if you are on a jury that that—that you would have to give a true verdict according to the law and evidence. You understand that?

A. Yes, I understand that.

Q. And, if the State—the next thing I'll ask you before we get the effect is I will ask you—assume, if you will with me, that the prosecutors prove to you beyond any reasonable doubt that the evidence is there and the questions in your mind, you're convinced beyond any reasonable doubt the questions should be answered yes, okay?

A. Yes, I understand.

Q. And, you're convinced of that in your mind beyond any reasonable doubt that the answers should be yes, okay?

A. Yes, I understand.

Q. And, *would you be untruthful in your answer intentionally and would you just deliberately answer the question untruthful*—untruthfully or would you answer the question according to what evidence showed, according to your oath as a juror? *Would you just intentionaly and deliberately answer the question untruthfully?*

A. No, I would not.

[PROSECUTOR]:L Object to this, It's not phrased in that—what the effect of his answer would be the death sentence.

THE COURT: I'll overrule the objection.

Q. [DEFENSE COUNSEL]: So, you wouldn't answer it untruthfully?

A. I would not answer untruthfully, no way.

Q. So, if you were faced with—the questions that the prosecutor read to you over here, and you either had to answer the questions yes or no, and if you felt in your mind that the answers should be yes, and they have proved that to you beyond any reasonable doubt, and you're required to give a *true answer* to the questions asked of you, okay?

A. Okay.

Q. Would you, simply because you knew that the effect of your answer would be, simply for that reason, *would you deliberately answer those questions untruthful just because you knew what the effect of your answers would be?*

A. I said before that I wouldn't answer untruthfully.

[PROSECUTOR]: Your Honor, we're going to object to the question. It assumes that one, that the venireman won't answer a question—we object; it's repetitive. The proper question would be could he answer the question yes if he found beyond a reasonable doubt that should be the answer, not whether he would automatically forswear himself. I don't think the juror should be asked to forswear himself.

THE COURT: I'll sustain the objection.

Q. Could you—we understand that all people have feelings about the death penalty one way or the other, Could you set those feelings aside and if the Court gave you two or three questions to answer, and you just had to answer them yes or no according to what the evidence is, okay?

A. Okay.

Q. And, could you set those feelings aside and look at the evidence if the Court instructed you to and look at the evidence and answer the questions *truthfully* based on the evidence? Could you do that?

A. I could answer the questions truthfully. *But, I could not put my feelings aside the way that I feel.*

Q. Well, if you have got those feelings that's something that everybody has, but when it comes down to answering the questions yes or answering the questions no, and you felt that the prosecutors proved to you beyond any reasonable doubt in your mind that the answers to the questions should be yes, okay?

A. I understand.

Q. Would you answer the questions yes?

A. Yes, I would.

Q. And, if they didn't prove to you that the answers should be yes beyond any reasonable doubt, would you answer the questions no?

A. That's right.

The defense then submitted Mr. Espindola to the court as a qualified juror. The court, however, sustained the State's challenge to the venireman and he was excused.

A review of venireman Espindola's initial testimony unambiguously reveals that he could never answer the special questions in such a way that would result in the assessment of the death penalty. While Espindola did admit in response to defense questioning that he could answer truthfully, the statement was made only after defense counsel had asked him if he would "intentionally and deliberately answer the question untruthfully." The appellant argues, however, that Espindola's "yes" answer to this final questioning regarding the vernirepersons's truthfulness in answering the special questions demonstrates his qualification as a juror under the test set forth in *Witherspoon*, supra. I cannot agree with this assertion.

The question of whether a venireperson's "yes" answer to this defense voir dire question will sufficiently rehabilitate the juror was addressed by this court in Vigneault v. State, 600 S.W.2d 318 (Tex.Cr.App. 1980). In that case the venireperson had testified that she could not think of any case in which she could assess the death penalty, that she would havt to answer one of the special questions "no" so that the defendant would get a life sentence, and that her deliberations on issues of fact would be affected by her knowledge that the mandatory penalty of death or life imprisonment would apply to the case. Taking that venireperson on voir dire, the defense attorney then explained the special question procedure and elicited the response, "I don't know," to his question, "[C]ould you answer both questions truthfully?" The following colloquy then occurred:

Q. [PROSECUTION]: In other words, will you take the information that comes from the stand and anser those questions truthfully to the best of your knowledge?

A. Yes.

Vigneault v. State, 600 S.W.2d at 324.

In holding that the venireperson was properly excused on the State's challenge for cause, Judge Clinton wrote:

> "The ultimate question, then, is whether Mrs. Hlozek's 'yes' response to defense counsel's final voir dire question had the effect of illustrating her capacity to be a fair and impartial juror vis a vis her unequivocal statements which revealed her to be incapable of answering the punishment issues according to the law and evidence because of deep seated, long held opposition to death as a penalty.
>
> "We are constrained to conclude that the tentative and qualified wording of defense counsel's question to Mrs. Hlozek—'will you take the information that comes from that stand and answer those qustions *truthfully to the best of your knowlege?* —renders her response thereto fairly useless for purposes of negating the import of her unequivocal admissions that her fact deliberations would be affected by the mandatory penalties. See e.g., Bell v. State, 582 S.W.2d 800 (Tex.Cr.app. 1979).
>
> "Accorrdingly, in view of the absence of further exploration of Mrs. Hlozek's final response, we hold that the fact that this venirewoman could answer the special issues *truthfully* to the *best of her knowledge* does not demonstrate that

her opposition to the extreme penalty of death would be subjugated in her perception and application of the facts during jury deliberations. This concise voir dire examination, when taken as a whole, presents an overall picture of a person whose strong and long held feelings of opposition toward death as a punishment for crime would prevent her from abiding by existing law or considering fairly the facts adduced. Lockett v. Ohio, supra. it is too mechanistic to reason that such a prospective juror is qualified because she would answer the punishment questions truthfully, *to the best of her knowledge*, in view of her strong and unequivocal assertions that her objections to the death penalty would compel her to answer one of the questions 'no.' See and cf. Smith v. State, 573 S.W.2d 763 (Tex.Cr.App. 1978). No error is shown by the exclusion of Mrs. Hlosek." [Emphasis in original.]

This Court similarly held in O'Bryan v. State, 591 S.W.2d 464 (Tex.Cr.App. 1979), cert. den. 446 U.S. 988, 100 S.Ct. 2975, 64 L.ed.2d 846 (1980) that a capital venireperson could successfully be challenged for cause, although on defense voir dire he answered that he could be truthful in answering the special questions on punishment. That venireperson had stated in response to the prosecutor's questions that he would automatically vote against the imposition of the death penalty no matter what evidence the trial revealed and that he could not think of any circumstances under which he could possibly vote for the death penalty. Judge W.C. Davis, writing for the majority, stated:

"Venireman Wells clearly and unambiguously expresse dopposition to the death penalty. His responses to questions asked of him in voir dire

> reveal that he opposed the death penalty to the extent that he would vote against death as a penalty, regardless of the facts in the case. Such deep seated an unyielding resolve to vote against the death penalty brought Wells within the narrow classification of venireman discussed in *Witherspoon*. The fact that Wells stated that he could truthfully answer the special issues submitted at the punishment hearing pursuant to Article 37.071 is not dispositive of appellant's claim. Here, venireman Wells took an open and unambiguous postition against the infliction of death as a penalty. He was not excused in violation of *Witherspoon*."

A single promise to be truthful in answering the special questions on punishment does not automatically qualify a venireperson to serve on a capital jury. Asking a venireperson if he will violate his oath has already been held by this Court to be of no use in determining that prosepctive juror's qualification. See Vanderbilt v. State, 629 S.W.2d 709 (Tex.Cr.App. 1981), cert. den. 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 169; Williams v. State, 622 S.W.2d 116 (Tex.Cr.App. 1981), cert. den. 455 U.S. 1008, 102 S.Ct. 1646, 71 L.Ed.2d 876.

Because of the majority holding in denying the State's second motion for rehearing without written opinion today, it is my sincere belief that the discretion of trial judges across this state in excusing potential venirepersons under *Witherspoon* has been seriously eroded, and the applicable portions of the decisions in Vanderbilt, supra, O'Bryan, supra, Vigneault, supra, and Williams, supra, have been cast aside and conveneintly ignored. As was so succintly put by the majority of this Court in Tezeno v. State, 484 S.w.2d 374 (Tex.Cr.app. 1972):

> "We cannot believe that Witherspoon v. Illinois, supra, requires certain formal answers and

> none other. We surely feel the test of Witherspoon is (not to be applied with hypertechnical and archaic approach of a nineteenth pleading book, but with realism and rationality.))"Ibid at 383, (quoting from Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469.)"

Further, in Hughes v. State, 563 S.W.2d 581 (Tex.Cr.App. 1979), cert. den. 440 U.S. 950, 99 S.Ct. 1432, 59 L.Ed.2d 640, a majority of this Court opined:

> "We must be mindful that where we only have a cold record before us the trial judge in passing on the answers of the 'equivocating veniremen' has the opportunity to observe the tone of voice and demeanor of the propective juror in determining the precise meaning intended."

Because a majority of this Court has seriously deviated from these well reasoned decisions, and because prospective jurors in capital cases will be submerged in a sea of meaningless semantics by opposing lawyers under the guise of "rehabilitation," and because of trial judge has been relegated to the role of impotent bystander, I dissent.

CAMPBELL, Judge

En Banc

Delivered September 14, 1983

Joined by T.Davis, W.C. Davis, and McCormick, JJ.

footnotes - B-1

APPENDIX B

Jimmy Loyd MEAD, Appellant,
v.
The STATE of Texas, Appellee.

No. 68025

Court of Criminal Appeals of Texas,
En Banc

Jan. 12, 1983.
Rehearing Denied Feb. 16, 1983.

Before the court en banc.

TEAGUE, Judge. OPINION

I. INTRODUCTION

Jimmy Loyd Mead, appellant, appeals his conviction for committing capital murder. After the jury found appellant guilty and answered in the affirmative the special issues submitted at the punishment stage of the trial, see Art. 37.071, V.A.C.C.P., the trial court assessed appellant's punishment at death.

II. APPELLANT'S CONTENTIONS ON APPEAL

Appellant presents in his appeal forty-five gounds of error; seventeen of which concern the selection of the jury in this cause. Because we have determined that a venireperson, Arturo Cabriales Espindola, was improperly excused by the trial court, we will only discuss appellant's ground of error number eight, which deals with the trial

court's exclusion of Espindola.[1] First, however, we will discuss some past decisions of the Supreme Court of the United States, which have discussed the imposition of the death sentence.

III. THIS COURT IS BOUND BY THE DECISIONS OF THE SUPREME COURT

[1] This Court, by virtue of Article VI of the Constitution of the United States of America, is bound by the decisions of the Supreme Court of the United States. The Supreme Court has decreed that the death penalty cannot be carried out if even one prospective juror has been excused on a challenge for cause by the State, when the challenge is based solely on that venireperson's opposition to the death penalty, *unless that opposition to the death penalty results in the venireperson's inability to follow the law.* See *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 [1980]; *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 [1978]; *Davis v. Georgia*, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 [1976]; *Maxwell v. Bishop*, 398 U.S. 262, 90 S.Ct. 1578, 26 L.Ed.2d 221 [1970]; *Boulden v. Holman*, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed.2d 433 [1969]; *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 [1968]; *Dur-*

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1. Although we restrict our discussion in this opinion to the exclusion of venireperson Espindola, our examination of the transcription of the voir dire examination of another venireperson, June Donnelly, causes us serious concern as to whether Donnelly was properly disqualified from serving as a juror in this cause. Because of the law that if even one prospective juror has been improperly excused the death penalty cannot be carried out, we do not discuss the exclusion of Donnelly. Also, because the appellant makes no claim in any of the other grounds of error challenging the sufficiency of the evidence of either the guilt or punishment stages of the trial, and because none of the other grounds of error reflect reversible error, we have declined to address either the sufficiency of the evidence or the other grounds of error.

rough v. State, 620 S.W.2d 134 [Tex.Cr.App.1981]; *Pierson v. State*, 614 S.W.2d 102 [Tex.Cr.App.1980].

IV. *WITHERSPOON V. ILLINOIS*

In *Witherspoon v. Illinois*, supra, the Supreme Court held that a prospective juror may not be excluded by the trial court for cause unless that person makes it absoluetly and unmistakably clear that 1] he would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before him, or 2] that the person's attitude toward the death penalty would prevent him from making an impartial decision as to the defendent's guilt. Thus, as a result of *Witherspoon*, "a sentence of death cannot be chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Witherspoon v. Illinois*, 391 U.S. at 522, 88 S.Ct. at 1777, 20 L.Ed.2d, at 784-785.

V. *BRANCH V. TEXAS* AND THE NEW TEXAS DEATH PENALTY STATUTES

Subsequent to the Supreme Court's decision of *Witherspoon v. Illinois*, supra, that Court, in *Branch v. Texas*, decided with *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L. Ed.2d 346 [1972], declared unconstitutional this State's system for imposing capital punishment. As a result of *Furman*, the Legislature of this State enacted new legislation relating to capital punishment. See Arti-

cle 1257 of the 1925 Penal Code, as amended,[2] and Art. 37.071, supra. V.T.C.A., Penal Code, Sec. 19.03, of the pre-

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2. Art. 1257, as amended, provided as follows:

Art. 1257. [1141][711][606] Punishment for murder

Text of article effective until January 1, 1974

(a) Except as provided in Subsection (b) of this Article, the punishment for murder shall be confinement in the penitentiary for life or for any term of years not less than two.

(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:

(1) the person murdered a peace officer or fireman who was acting in the lawful dicharge of an official duty and who the defendant knew was a peace officer or fireman;

(2) the person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;

(3) the person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;

(4) the person committed the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.

(c) If the jury does not find beyond a reasonable doubt that the murder was committed under one of the circumstances or conditions enumerated in Subsection (b) of this Article, the defendant may be convicted of murder, with or without malice, under subsection (a) or this Article or of any other lesser included offense.

(d) If one of the circumstances or conditions enumerated in Subsection (b) of this Article is charged in an indictment, the prospective jurors shall be informed that a sentence of either death or imprisonment for life is mandatory on conviction for the offense charged. No

(footnote continued on following page)

sent Penal Code of this State,[3] is substantially similar to Art. 1257, supra. Sec. 19.03 limits capital homicides to

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(footnote continued from previous page)

person is qualified to serve as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

(e) in this Article:

(1) "Penal institution" means an institution operated by or under the supervision of the Texas Department of Corrections or a city, county, or regional jail.

(2) "Peace officer" means a person defined as such by Article 2.12, Code of Criminal Procedure, 1965, as amended.

Amended by Acts 1973, 63rd Leg., p. 122, ch. 426, art. 1, § 1, aff. June 14, 1978.

3. Sec. 19.03 defines what constitutes capital murder, and provides as follows:

> (a) A person committs an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:
>
> (1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or firemen;
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;
>
> (3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
>
> (4) the person commits the murder while escaping or attempting to escape from a penal institution; or
>
> (5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

(footnote continued on following page)

intentional and knowing murders committed in only five situations. After *Furman*, the legislature of this State also enacted a new capital-sentencing procedure. See Art. 37.071, supra. Although in *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 [1976], the Supreme Court was unable to agree upon an opinion, seven members of the Court did agree that the imposition of the death penalty for the crime of murder under Texas statutes did not violate the prohibition against the infliction of cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution. For further discussion on the subject of past and present Texas law governing capital cases and the sentencing procedures involved in the imposition of the death sentence, we will refer the reader to *Furman v. Georgia*, supra, and *Jurek v. Texas*, supra.

However, we will point out that one of the most significant changes in a capital case that the new legislation brought about, as to the imposition of the death sentence, is that the jury no longer assesses the death sentence, but instead makes objective findings of fact as to two or three special issues or questions submitted to it by the trial court. If the submitted questions are all answered in the affirmative, then the trial court, not the jury, assesses death. See Art. 37.071, supra. Also see *Jurek v. Texas*, supra.

(footnote continued from previous page)

(b) An offense under this section is a capital felony.

(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

VI. JURY SELECTION IN THIS CAUSE OCCURRED PRIOR TO *ADAMS V. TEXAS*

Another decision of the Supreme Court that has had great impact upon the capital sentencing procedures of a capital case in Texas is *Adams v. Texas*, supra. We observe that jury selection in this cause occurred prior to the Supreme Court's decision of *Adams v. Texas*, supra. However, as previously noted, we are bound by that decision. The Supreme Court in Adams interpreted its decision of *Witherspoon v. Illinois*, supra, as such decision was applicable to a Texas statute, see V.T.C.A., Penal Code, Sec. 12.31[b],[4] which statute disqualifies a prospective juror who is unwilling to swear that the mandatory penalty of death or life imprisonment for the offense of capital murder will not *affect* that person's deliberations on factual issues in the case. In *Adams*, the Supreme Court held that Sec. 12.31[b] stated a disqualification standard impermissibly broader than *Witherspoon* permitted and, contrary to past decisions of this Court, see, for example, *Bodde v. State*, 568 S.W.2d 344, 348 [Tex.Cr.App. 1978], held that Sec. 12.31[b] may not be used as a basis for disqualification independent of Witherspoon. Thus, a prospective juror may not be disqualified solely pursuant to Sec. 12.31[b], but his answers to questions asked concerning how the death penalty might affect his serving as a juror must be viewed in a light dependent upon *Witherspoon*.

VII. NOT ALL PERSONS ARE QUALIFIED TO SERVE AS JURORS IN A DEATH PENALTY CASE

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4. Sec. 12.31(b) provides that:

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty or imprisonment for life will not affect his deliberation on any issue of fact.

We pause to point out that the above does not mean that a prospective juror may never disqualify from serving as a juror in a capital case. We believe that the above decisions of the Supreme Court stand for the proposition that a prospective juror in a capital case is not subject to a challenge for cause by the prosecution unless that person's views reflect that regardless of what evidence may be presented by the State, the prospective juror, nevertheless, will vote "No" to at least one of the submitted special issues, or will distort the admitted evidence in such fashion as to prevent him from adhering to the applicable law governing the case; be it at the guilt or the punishment stages of the trial. Compare *Lackey v. State*, 638 S.W.2d 439 [Tex.Cr.App.1982] [Appellant's Motion for Rehearing]; *Moore v. Estelle*, 670 F.2d 56 [5th Cir.1982]. Also see *Porter v. State*, 623 S.W.2d 374 [Tex.Cr.App.1981]; *Lockett v. Ohio*, supra; *Granviel v. Estelle*, 655 F.2d 673 [5th Cir.1981]. We find that the Supreme Court, when it pointedly stated the following in *Adams v. State*, supra, has for the present time placed the perimeter upon when a prospective juror may *not* be excused because of his views toward the death penalty:

> Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas [capital] murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. [100 S.Ct. at 2529].

VIII. DID THE TRIAL COURT ERR IN EXCUSING VENIREPERSON ESPINDOLA?

[3] With the above backdrop in mind, we will now direct our attention to the issue at bar: Did the trial court

err in excusing venireperson Espindola after the State challenged the juror because of his beliefs regarding the death penalty? The record reflects that Espindola, by the initial responses he gave to questions asked by the prosecuting attorney during voir dire examination, which responses indicated Espindola's views of the death penalty and the stance he would take in answering the special issues, appears, *at that point in time,* to have been disqualified from serving as a juror in this cause. However, the record amply demonstrates that when appellant's attorney subsequently examined Espindola, the venireperson stated. inter alia, that he could listen to the evidence and answer the special issues or questions; that he would render a true verdict according to the law and the evidence; and that he would not answer the questions "untruthfully". The record further reflects the following:

> Q: Would you, simply because you knew what the effect of your answers would be, simply for that reason would you deliberately answer those questions untruthful just because you knew what the effect of your answers would be?
> A: I said before that I wouldn't swear untruthfully.
>
> * * * * * * *
>
> Q: And, could you set those feelings [about the death penalty] aside and look at the evidence if the Court instructed you to and look at the evidence and answer the questions truthfully based on the evidence? Could you do that?
> A: I could answer the questions truthfully, yes. But, I could not put my feelings aside the way I feel.
> Q: ...and [if] you felt that the prosecutors proved to you beyond any reasonable doubt in your mind that the answers to the questions should be yes...
> Q: Would you answer the questions yes?

A: Yes, I would.
Q: And, if they didn't prove to you that the answers should be yes bewond any reasonable doubt, would you answer the questions no?
A. That's right.

The record also reflects that after the above transpired no further questioning of Espindola occurred, either by the trial court or the prosecuting attorney. The State's challenge for cause was sustained and the trial court excused Espindola over the appellant's objection. We hold that the trial court erred in excusing Espindola as he was not disqualified from serving as a juror in this cause. Defense counsel effectively rehabilitated Espindola by asking explicit, clear questions to which Espindola gave clear, definite answers, showing that despite his feelings against the death penalty, he could and would truthfully answer all of the special issues according to the evidence adduced. The record reflects that Espindola never indicated or stated that he would not take the oath to render a true verdict, nor did he state that he would consciously distort the evidence so that he would be able to answer at least one special issue or question with a "No" answer. Although Espindola's feelings toward the death penalty were relevant to allow the State to intelligently exercise a peremptory challenge, that, standing alone, was insufficient reason to warrant the trial court sustaining the State's challenge for cause. Espindola was not disqualified to serve as a juror in this cause. The trial court erred in sustaining the State's challenge for cause. Cf. *Vanderbilt v. State*, 629 S.W.2d 709, 725-729 [Tex.Cr.App.1981].

XI. THE CONVICTION MUST BE REVERSED

As previously noted, the improper exclusion of even one prospective juror by a trial court in a capital case where the death penalty has been assessed requires that a judg-

ment of conviction be revered. The judgment of the trial court is therefore reversed and the cause remanded.

TOM G. DAVIS, W.C. DAVIS, McCORMICK and CAMPBELL, JJ., dissent.

APPENDIX C

VOIR DIRE EXAMINATION

OF

ARTURO CABRIALES ESPINDOLA

[Preliminary Questions Omitted]

Q. Right now, I would like to go into a little bit about the capital murder law in our state and other laws. If any of us ever get our questions to you too tied up or drawn out or too long, we change horses in the middle of the stream, just stop us. Just stop us and tell us to straighten it out. We will make it clear for you. This is a complicated area and we occasionally get confused to where we don't even understand it. Capital murder in our state is the murder of an individual with additional circumstances along with it. The statutes—the legislature has set these out such as murder during the course of a robbery is capital murder. Murder for hire when someone has hired someone else to kill is capital murder, and murder of a police officer or fireman while in the lawful discharge of their duties is capitol murder. So, you see it's murder which is against the law to begin with and that along with other circumstances make it capital murder in our State. Do you have any disagreement with these laws in capital murder?

A. I do not, sir.

Q. Thank you. This case itself is—the State has alleged in the indictment that the offense occurred on or about February 13th, 1979, and that the defendant, Jimmy Loyd Mead, intentionally and knowingly took the life of James Michael Carpenter, a peace officer in the lawful discharge of his duties. By any chance, did you know the Crowley

Police Officer, James Michael Carpenter, during his lifetime?

A. No, Sir.

Q. By any chance, have you heard anything of the facts of this case?

A. This is the only place, sir.

Q. So, you have not formed any opinions from anything that you have heard outside of the courtroom?

A. I have not heard anything, sir.

Q. In a capital murder case in Texas, there are only two potential punishments, life in the penitentiary and death by lethal injection. In all other criminal cases in Texas, a jury that decides on punishment is given a range of punishment to pick from, because all cases are different. The legislature sets a range of years in the penitentiary that the jury is to look at and pick the appropriate punishment if they find the man guilty. And, in a capital case, like I say, it differs because there are only two potential punishments, life in the penitentiary or death by lethal injection. The Judge asked you, I believe, when you were all in here together, that—asked you to think about capital punishment. Have you had an opportunity to do that?

A. Yes, sir.

Q. What are your feelings about it?

A. I have been going through this over in my mind and I really don't believe in life sentences. I don't believe in the other.

Q. Is this—you don't believe that you could be part of a jury that would inflict death on a person by lethal injection?

A. Yes, I don't believe in that, sir.

Q. And, as I say, we are here to find out what your beliefs are, not trying to get you to say what someone might want you to say or anything like that. You agree that people have a duty to serve on a jury?

A. I do.

Q. Do you also agree that if a person has personal beliefs in a particular case that would interfere with their jury service? They have the duty to tell the people about it and not serve if they couldn't serve and violate their own beliefs?

A. Well, I wouldn't like to violate my own beliefs. But, I still say I do not believe in the death penalty.

Q. That's what I'm saying, sir. Where you might be a perfect—perfectly good and qualified juror in a case that didn't assess the death penalty—

> MR. KEARNEY: We're going to object to the—questioning the juror about perfectly qualified in another case when he's questioning him about the death penalty.
>
> THE COURT: I will overrule the objection, but instruct Counsel to state an otherwise qualified juror.

MR. BORG: (Continuing)

Q. Is this belief—you don't believe in the death sentence—as your being part of the jury that would have to inflict the death penalty?

A. Sir, I don't believe in the death penalty.

Q. At all?

A. At all.

Q. Is this—this is a deep-seated and firm conviction on your part, I take it?

A. Yes, I was—ever since we got the briefing a week ago, I have been going through it in my mind and I just came to that conclusion, sir.

Q. And, you could not vote for the death penalty in a case no matter how horrible the facts were?

A. No, sir, I could not vote for the death penalty.

Q. I will go into the procedure a little more, but is this—because of this belief, you are irrevocably committted before the trial begins to vote against the death penalty regardless of the facts and circumstances because of your belief?

A. That's right.

Q. And, is this belief such that you're telling us in advance now at voir dire, which is proper, your beliefs. Is the belief such that you might have to inform the Court that your beliefs are such that you could not take the oath as a juror in this case to enforce the death penalty?

MR. KEARNEY: Your Honor, we're going to object to the form of the question. he's pinning him down about what he would do in this case.

THE COURT: I will overrule the objection and inform the juror he's not asking you how you would vote on the facts of this case. He's asking you with

regard to this or any capital murder case that you might be called upon to serve in.

MR. KEARNEY: Your Honor, we are going to object to the Court's statement to the juror as an effect of binding him to this case. The Court said this or any other case. I think the proper inquiry is any capital case. I think the proper inquiry is in any capital murder case and not to mention it in this case in particular.

THE COURT: I'll overrule that objection.

MR. KEARNEY: Note our exception.

MR. BORG: (Continuing)

Q. Your beliefs are such that in a capital murder case, one where the punishment would be death by lethal injection, that you might have to tell the Court that you could not take the oath to follow the law where the law might require you to give the death sentence by lethal injection, is that right?

A. I would like to clarify that.

Q. First of all, I'm not trying to argue with your beliefs. I'm just trying to get them down—you could not sit on a jury and decide the facts knowing that the verdict would result in the death of an individual, if you had to decide a certain way, is that right?

A. I would not know what the verdict would be, sir, but I still do not believe in the death penalty.

Q. And, would this belief prevent you from objectively looking at the facts? Would it affect your deliberations and have a profound effect on your deliberations and prevent you from deciding these facts?

A. I need more clarification on that, sir.

Q. Let me into the procedure then and make it as clear as I can. In a capital murder case, as I told you, the only two potential punishments are life or death, and if the jury finds the defendant guilty of capital murder beyond a reasonable doubt, which they must do in any and all capital murder cases, in order to reach the punishment phase they have to find him guilty beyond a reasonable doubt of capital murder. Then, we go to a punishment phase. The trial is in two parts. First, the jury decides is he guilty of capital murder and renders a verdict of guilty or not guilty. Then, the jury comes back and we hear more evidence and they decide what the punishment is going to be, life or death, but, the jury doesn't go back in the jury room on the punishment phase when they are deciding punishment, and write down on the verdict form life or death. What they do is, under the law, is they write down the answers to two or three questions which the Judge submits to them under the law. And, the way they answers these questions dictates and requires—tells the Judge what he must do. If they answer all these questions, and I'll read the questions to you, but if they answer all these questions yes, the Judge has no choice. He has to sentence that man to death. So, let me read these questions to you. The first question is, "Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result." I'll read that again. "Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with a reasonable expectation that the death of the deceased or another would result. The second question is, "Whether there is probability that this defendant would commit continuing acts of violence that would constitute a continuing threat to society." I'll read that again. "Whether there is a probability that the defendant would commit continuing criminal acts of violence that would constitute a continuing threat to society."

And, the third question which may be submitted, if raised by the evidence is, "Whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, of the deceased." That's a question involving provocation of the deceased if there was, and, was the defendant's conduct unreasonable in response to that. These are questions about the case itself and the man himself, and the jury goes back and answers these yes or no, both of them or all three of them, depending on what is sumitted. But, even though—then they bring the answers out to the Judge, but if they answer all three of those questions yes, this Judge—the Judge in a capital murder case has to assess the death penalty by lethal injection. Have I made that clear?

A. Yes, sir.

Q. If they answer any of them no, the Judge would automatically assess a life sentence. The jury answers questions but there is no pretending that the jury doesn't know what the effect of their answers is. The law doesn't require the jury to ignore that. They know if they come out here with three yes answers that Judge has to assess death. Do you understand that?

A. Yes, sir.

Q. Is this belief on your part such that it would have—it would be—have a profound disabling effect on your deliberations that because of your beliefs that you don't believe in the death penalty that no matter what the facts were you could not answer all three of these questions yes, knowing that your verdict would be death to that man?

MR. KEARNEY: Now, Your Honor, we are going to object to the form of that question. He said—

THE COURT: I understand the question and I will overrule the objection.

MR. KEARNEY: I think we need to be more specific in our objection.

THE COURT: What is your legal objection?

MR. KEARNEY: We object to the question—form of the question on the grounds that he stated in the question that would you answer no without any qualifications as to what the answer—without any qualifications as to what the evidence might be.

THE COURT: Your objection is overruled, Counsel.

MR. BORG: (Continuing)

Q. Is your belief that you don't believe in the—do you remember the question?

A. Yes.

Q. You could not vote yes to these answers—

MR. KEARNEY: He's answered the question.

MR. BORG: (Continuing)

Q. Because you don't believe in the death penalty, then would you automatically vote no to these questions no matter what the facts were to keep the man from getting a death sentence?

A. I imagine I would.

Q. All right. Because of your beliefs?

A. Yes, because of my beliefs.

A. And, your belief would have a—would enter into these deliberations because you just don't believe in it,

and you could not vote yes and you would vote no, is that right?

A. That's right.

Q. Is this your attitude toward the death penalty? This is a deep-seated feeling that you have that you wouldn't let anyone talk you out of it?

MR. KEARNEY: That's repetitious, Judge.

THE COURT: I'll sustain the objection.

MR. BORG: Your Honor, we would submit the venireman to the Court.

THE COURT: I'll excuse the venireman.

MR. KEARNEY: May we take him on voir dire, Your Honor?

THE COURT: You may.

VOIR DIRE EXAMINATION
OF
ARTURO CABRIALES ESPINDOLA

BY MR. KEARNEY:

Q. Sir, you understand that before you would even be faced with these questions, you first would have to be part of a jury that found a person guilty beyond any reasonable doubt of capital murder. You understand that?

A. I understand that.

Q. And, do you feel like you understand what the questions are that he read to you?

A. Yes.

Q. First of all, let me ask you if you feel like that you could answer those questions—first of all, before we get into what effect it would have on you, do you feel like you are the kind of person that could listen to the evidence and answer questions proposed to you?

A. Yes.

Q. You wouldn't have any problem with answering questions.

A. No, I wouldn't.

MR. BORG: Objection—the question is not framed that these questions are the punishment questions that could lead to the—he's just talking about questions in general and this is beyond the scope of the voir dire.

THE COURT: I'll overrule the objection.

MR. KEARNEY: (Continuing)

Q. Second, you understand that if you are on a jury that that—that you would have to give a true verdict according to the law and evidence. You understand that?

A. Yes, I understand that.

Q. And, if the State—the next thing I'll ask you before we get the effect is I will ask you—assume, if you will with me, that the prosecutors prove to you beyond any reasonable doubt that the evidence is there and the questions in your mind, you're convinced beyond any reasonable doubt that the questions should be answered yes, okay?

A. Yes, I understand.

Q. And, you're convinced of that in your mind beyond any reasonable doubt that the answers should be yes, okay?

A. Yes, I understand.

Q. And, would you be untruthful in your answer intentionally and would you just deliberately answer the question untruthful—untruthfully or would you anwer the question according to what the evidence showed, according to your oath as a juror? Would you just intentionally and deliberately answer the question untruthfully?

A. No, I would not.

MR. BORG: Object to this. It's not phrased in that—what the effect of his answer would be, the death sentence.

THE COURT: I'll overrule the objection.

MR. KEARNEY: (Continuing)

Q. So, you wouldn't answer it untruthfully?

A. I would not answer untruthfully, no way.

Q. So, if you were faced with—the questions that the prosecutor read to you over here, and you either had to answer the questions yes or no, and if you felt in your mind that the answers should be yes, and they have proved that to you beyond any reasonable doubt, and you're required to give a true answer to the questions asked of you, okay?

A. Okay.

Q. Would you, simply because you knew what the effect of your answer would be, simply for that reason, would you deliberately answer those questions untruthful just because you knew what the effect of your answers would be?

A. I said before that I wouldn't answer untruthfully.

MR. WORLEY: Your Honor, we're going to object to the question. It assumes that one, that the venireman won't answer a question—we object; it's repetitive. The proper question would be could he answer the question yes if he found beyond a reasonable doubt that should be the answer, not whether he would automatically forswear himself. I don't think the juror should be asked to forswear himself.

THE COURT: I'll sustain the objection.

MR. KEARNEY: (Continuing)

Q. Could you—we understand that all people have feelings about the death penalty one way or the other. Could you set those feelings aside and if the Court gave you two or three questions to answer, and you just had to answer them yes or no according to what the evidence is, okay?

A. Okay.

Q. And, could you set those feelings aside and look at the evidence if the Court instructed you to look at the evidence and answer the questions truthfully based on the evidence? Could you do that?

A. I could answer the questions truthfully, yes. But, I could not put my feelings aside the way that I feel.

Q. Well, if you have got those feelings that's something that everybody has, but when it comes down to answering the questions yes or answering the questions no, and you felt that the prosecutors proved to you beyond any reasonable doubt in your mind that the answers to the questions should be yes, okay?

A. I understand.

Q. Would you answer the questions yes?

A. Yes, I would.

Q. And, if they didn't prove to your that the answers should be yes beyond any reasonable doubt, would you answer the questions no?

A. That's right.

MR. KEARNEY: We'll pass the venireman back and submit that he is qualified. He said that he could answer the questions truthfully.

THE COURT: The State's challenge to the venireman is sustained, and the venireman will be excused.

MR. KEARNEY: Note our exception.

THE COURT: Your are excused, Mr. Espindola.

MR. ESPINDOLA: Thank you.